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ODI reports

The Government's Office for Disability Issues (ODI) has published its first report, setting out the action that it has taken since it was set up in December 2005.

The main body of the report looks at:
- the overall strategy of the ODI
- progress made towards equality for disabled people since the "Life Chances" report
- priorities for future action.

The second part of the report shows a shorter set of summary tables, which set out specific initiatives that are underway in direct response to the recommendations in the Life Chances report (see LELR 114).

To download copies of the report, go to: www.officefordisability.gov.uk/docs/annual_report_06/pdfs/ar_main.pdf. Hard copies in other formats are available on request from office-for-disability-issues@dwp.gsi.gov.uk.

All in the mind?

Workers are being asked to give their views on the ups and downs of working life in a national survey.

The 24-7 survey is an annual research project conducted by the Work Life Balance Centre, Keele University and Coventry University.

The researchers want employees to share their good and bad experiences in an attempt to discover more information about the true nature of modern working life,

Each year the results are collated into a final report that is disseminated to around 3,000 companies, universities, business support organisations and workplaces all over the world. The survey was launched at the end of September, and is available for completion until mid November.

Go to: www.worklifebalancecentre.org/ 2006/stage1.php to take part.

LELR goes weekly

There have been growing requests from readers to receive LELR by email. From February therefore LELR will be produced as a weekly electronic update. The print version of LELR will be published quarterly from January.

To receive LELR by weekly email please fill in the enclosed card providing your name, union and title (if appropriate) and e-mail address.

Ideas about what readers would like to see in the new quarterly LELR will be very welcome. Suggestions for subjects can be included in the comment box.

Action plan for women

Following the publication of the Women and Work Commission report earlier this year, the Government has published an action plan to tackle barriers to women's achievement in the workplace identified in the report.

The plan proposes a number of measures including:

- an "Exemplar Employer Initiative" to develop programmes with employers, such as helping women who return from work to access quality part-time work, to encourage flexible working for women and to set up job share registers
- the roll-out of new "equality reps" to step up awareness among workers of flexible working rights and discrimination issues
- a new "equality check" to help companies spot any emerging problems with equal treatment of staff
- a national education standard in schools to step up cultural change by making girls aware of non-traditional career opportunities
- a half a million pound fund to support companies and organisations to increase the number of senior roles available part time.

Vulnerable workers

One in five workers can be classed as vulnerable and subject to exploitation, according to a report written for the TUC by the independent Policy Studies Institute called *The Hidden One-in-Five – Winning a Fair Deal for Britain's Vulnerable Workers*.

The report uses official statistics to show that around 5.3 million workers earn below one third of the median hourly wage and do not have a trade union to negotiate their terms and conditions, and are therefore vulnerable to exploitation.

Recommendations for future action include:

- support for, and early implementation of, the EU Temporary Agency Workers Directive
- introduce licensing for all employment agencies, similar to that for gangmasters
- modernise the law on employment status so that agency, casual and other vulnerable workers have employee status with contracts of employment and entitlement to statutory employment rights
- improve enforcement of employment rights such as the minimum wage
- extend union recognition rights to small employers
- step up union work to organise and represent vulnerable workers.

For a copy: www.tuc.org.uk/theme/index.cfm?theme=oneinfive

Lack of sleep caused depression

A North East factory worker who was left disabled after working night shifts, was discriminated against by his employers, a tribunal has found. Craig Routledge became depressed after working alternate day and night shifts for TRW Systems in Washington.

The punishing routine left him registered disabled after the sleep deprivation caused him to become depressed. A Newcastle employment tribunal upheld claims of disability discrimination brought against TRW Systems by Craig's union, the GMB and their lawyers, Thompsons Solicitors.

The tribunal ruled that the company, which manufactures car parts, had indirectly discriminated against Craig's disability by not giving him assurances that they would provide a full time day job for him after he became too ill to work nights.

It also ruled that TRW Systems had discriminated against his disability by not offering to make adjustments in the work place to allow him to return to work.

For more details, go to: www.thompsons.law.co.uk/ntext/disabled-factory-worker-discriminated-against.htm

By way of compensation

Trade unions are being consulted on the draft code of practice of the Compensation Act.

Unions are exempt from regulation under the Act, but will have to comply with the code to remain unregulated. This means that unions will be able to continue to offer high quality legal services to members.

The draft code is a relatively light touch and gives unions the right to give impartial advice about whether to pursue a claim. It does not allow them to give advice to an individual based on an assessment of the best interests of the collective.

However, the proposed definition of member as "full" or "retired" may prevent their offering legal services to other categories of members and to family members. Unions want this changed so the definition is according to their rule books. The Compensation Act forces claims management firms to apply for authorisation to operate and to adhere to rules on conduct and accounts.

Transsexual pension

A male to female transsexual who claimed she was entitled to a state pension at age 60, rather than 65, has won her case at the European Court of Human Rights.

The ECHR decided in **Grant -v- United Kingdom** that, by refusing to grant her a pension at 60, UK law was incompatible with article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms – the right to respect for private and family life.

Following gender reassignment surgery, Ms Grant asked for her state pension to start on 22 December 1997, her 60th birthday. She was told, however, that because her birth certificate identified her as male, she was not entitled to receive a pension until 65.

After the court decided in Goodwin -v- United Kingdom that post-operative transsexuals were entitled to have their change of gender recognised by law, Ms Grant asked for that decision to be applied to her case. She succeeded, but only with effect from 2002, by which time she was only a few months off 65.

Long road to equal pay

It is unusual for the European Court of Justice to disagree with the opinion of the Advocate General, but it has just done so in the case of Cadman -v- Health and Safety Executive (LELR 95 and 113).

The court ruled that employers do not have to objectively justify differences in pay that stem from the use of "length of service" as a criterion in their pay system. This was because rewarding experience was a legitimate objective that enabled workers to do their job better.

Employers would only have to justify the criterion if a worker could provide evidence that raised serious doubts about whether it was an appropriate way of rewarding experience.

Mrs Cadman brought a claim for equal pay against her employer, relying on four male comparators who were all on the same grade as her, but paid substantially more. They had all worked for the HSE for longer than her.

As the proportion of men with longer service was greater than that of women, Mrs Cadman claimed that the use of length of service as a determinant of pay was indirectly discriminatory against her and that her employer should be required to justify it objectively.

We will cover this decision in more detail in the next issue of LELR.

Ready Reckoner

With the introduction of the age regulations on 1 October, the upper age limit on unfair dismissal and redundancy was removed, as well as the lower age limit for redundancy pay.

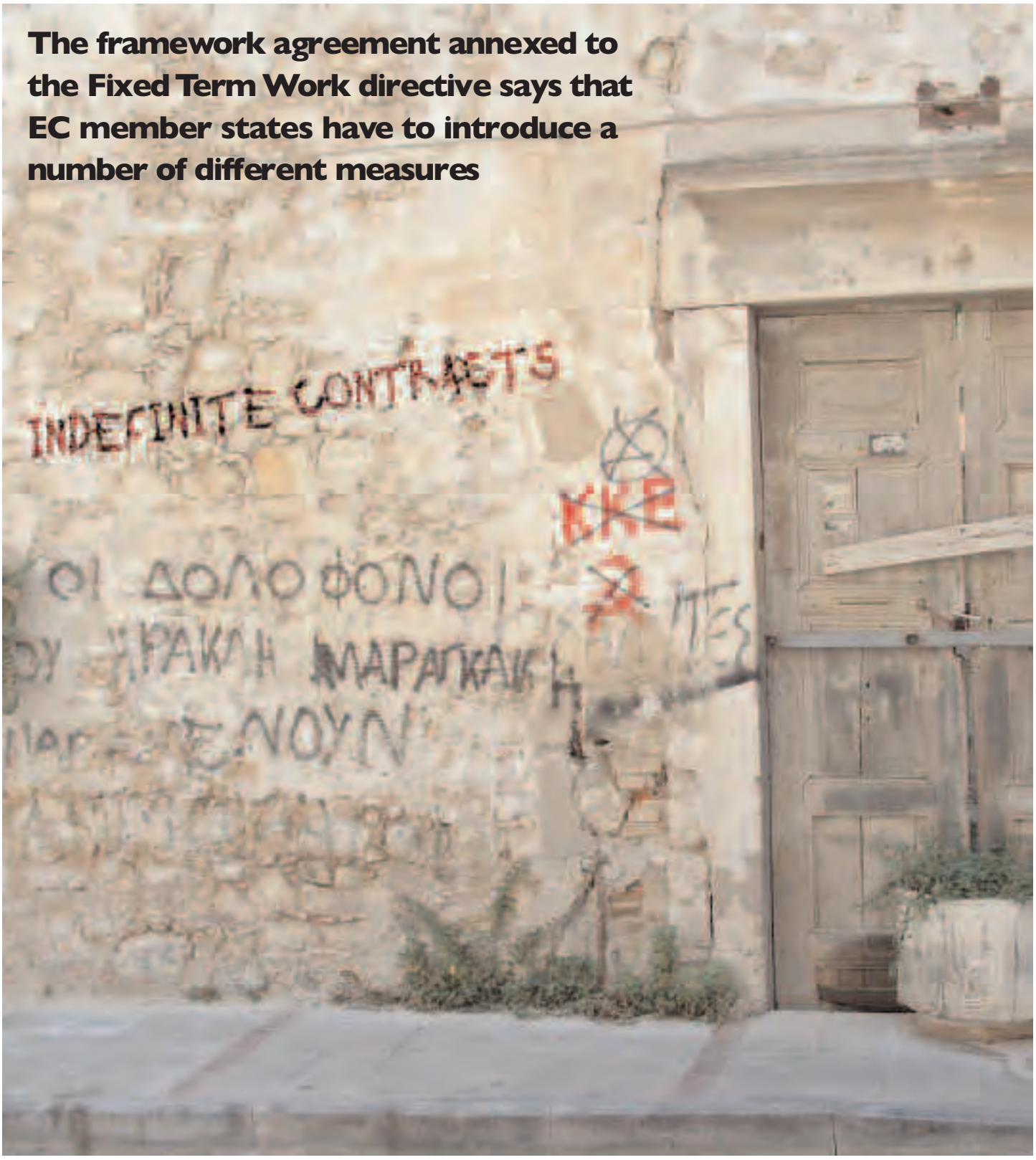
The DTI has introduced a "ready reckoner" to help employees calculate the amount of statutory redundancy pay to which they are entitled, depending on whether they were made redundant before or after 1 October.

Those made redundant before the introduction of the regulations should go to: www.dti.gov.uk/employment/employment-legislation/employment-guidance/page27698.html

Those made redundant after 1 October should go to: www.dti.gov.uk/employment/employment-legislation/employment-guidance/page33157.html

End of term

The framework agreement annexed to the Fixed Term Work directive says that EC member states have to introduce a number of different measures



According to Clause 5(1) of the framework agreement, EC member states have to introduce one or more of the following measures:

(a) objective reasons justifying the renewal of fixed term contracts
(b) the maximum total period for using successive fixed term employment contracts
(c) the number of renewals.

In **Adeneler and ors -v- Ellinikos Organismos Galaktos (IRLR 2006, 716; IDS 812)**, the European Court of Justice (ECJ) has said that an objective reason has to be precise and concrete, and has to characterise a "given activity".

What were the basic facts?

Eighteen Greek public sector employees were engaged on a series of fixed term contracts (of eight months each) between May 2001 and June 2002.

All the contracts related to the same post, but were separated by gaps ranging from 22 days to 11 months. The contracts came to an end between June and September 2003 and were not renewed.

The employees argued that their contracts should be made indefinite, on the basis that they did regular work corresponding to "fixed and permanent needs" and there was no objective reason to justify their renewal.

What did Greek law state?

The Greek legislation implementing the directive stated that fixed term contracts would only be deemed "successive" if there was less than 20 working days between them.

It also stated that, if a contract was renewed for two years or more (and there was no objective reason to keep on renewing it), it would be deemed to be "covering the fixed and permanent needs of the undertaking or operation", and should be made permanent.

What questions did the court ask the ECJ?

The Greek court asked the ECJ to answer the following questions:

1. If a directive is transposed late into national law, does the national court have to interpret its domestic law from the time it came into effect; from the time it should have come into effect; or from the time when the national measure implementing it came into effect?
2. Can the requirement of a statute constitute an objective reason for concluding successive fixed term contracts?
3. Is a national provision, which lays down that successive contracts should not be separated by a period of time longer than 20 days, compatible with clause 5(1) of the framework agreement?
4. Can member states have a provision in domestic law that says that fixed term contracts need not be made permanent if the contracts ostensibly cover an employer's seasonal needs, but are, in fact, covering permanent needs?

What did the ECJ decide?

The ECJ answered as follows:

1. Once the period for transposing the directive has expired, national courts must interpret their law in line with the provisions of the directive.
2. A national law that allows the use of successive fixed term contracts in a "general and abstract manner" does not constitute an "objective reason", under clause 5(1)(a). It needs "precise and concrete circumstances characterising a given activity" in a particular context to justify successive fixed-term contracts.
3. A national rule stating that fixed term employment contracts could only be successive if there was less than 20 working days between them was contrary to clause 5, as it meant that most fixed term employment relationships would fall outside the directive.
4. Member states cannot have legislation prohibiting a succession of fixed term contracts that covered "fixed and permanent needs" from being converted into indefinite contracts. In this case, the law was being used to conclude fixed term contracts designed to cover "fixed and permanent needs".

Comment

This case provides useful guidance to the likely attitude of the European Court to objective justification. To meet the test, it will no longer be good enough for employers to have vague, general reasons for needing fixed term contracts.

This is particularly relevant because, since 10 July 2006, employees who have been employed on two or more successive fixed term contracts for a period of four or more years will be deemed to be permanent employees. Advisors should make sure to rely on this case when resisting employers' weak arguments for continuing to use fixed term contracts.

Working time

Regulations 10 and 11 of the Working Time Regulations 1998 (WTR) set out workers' rights to minimum daily and weekly rest periods

In **Commission -v- United Kingdom**, the European Court of Justice (ECJ) has ruled that the Government was wrong to publish guidance saying that employers do not have to ensure that workers actually take these rest breaks.

What does the law say?

Regulation 10 of the WTR (implementing article 3 of the directive) states that an adult worker is entitled to a rest period of not less than 11 consecutive hours in each 24-hour period.

Regulation 11 (implementing article 5), provides that an adult worker is also entitled to an uninterrupted rest period of not less than 24 hours in each seven-day period.

To help employers and workers to gain a better understanding of the regulations, the Department of Trade and Industry published some guidance, which stated that "employers must make sure workers can take their rest, but are not required to make sure they do take their rest".

What were the basic facts?

Amicus objected to the guidance, arguing that it did not properly implement the directive. It alerted the Commission of the EC, which sent a letter of formal notice to the Government in March 2002 that it had not correctly implemented articles 3 and 5.

Not satisfied with the response to that letter, the commission asked the UK in May 2003 to make the necessary amendments to ensure it was in compliance with the directive, but the UK refused saying that the guidance was consistent with it.

The commission complained to the European Court of Justice that the guidance was likely to encourage a practice of non-compliance with the directive.

What did the Government argue?

The Government argued that, far from encouraging non-compliance with the regulations, the guidance emphasised the duty on employers to ensure that their workers could take the rest periods to which they were entitled

It said that employers should obviously not behave in a way that would prevent workers from taking the rest, but that the directive could not be interpreted to mean that they had to ensure that workers took them. That obligation, it said, would raise real uncertainties as to the extent of the measures that employers were required to take.

What did the ECJ decide?

The ECJ said that the wording of the directive requires workers to "actually benefit from the daily and weekly periods of rest provided for". Member states therefore have to guarantee that all the requirements are observed.

> The court therefore concluded that the UK had failed in its obligations under the directive

As the purpose of the directive was to protect the health and safety of workers,

member states that did not ensure that workers were able to exercise their rights were not guaranteeing compliance with either the minimum requirements of articles 3 and 5 or the essential objective of the directive.

And although employers should not be expected to force workers to take their rest periods, guidance telling them that they did not have to was liable to render the rights of workers under the directive meaningless.

It also said that guidance telling employers that they do not have to ensure that workers take their rest periods was incompatible with the objective of that directive, in which minimum rest periods "are considered to be essential for the protection of workers' health and safety."

The court therefore concluded that the UK had failed in its obligations under the directive.

It also found that it was in breach of regulation 20(2) – the exception dealing with partly unmeasured working time – but which the UK had already resolved by removing the exception as of 6 April 2006.

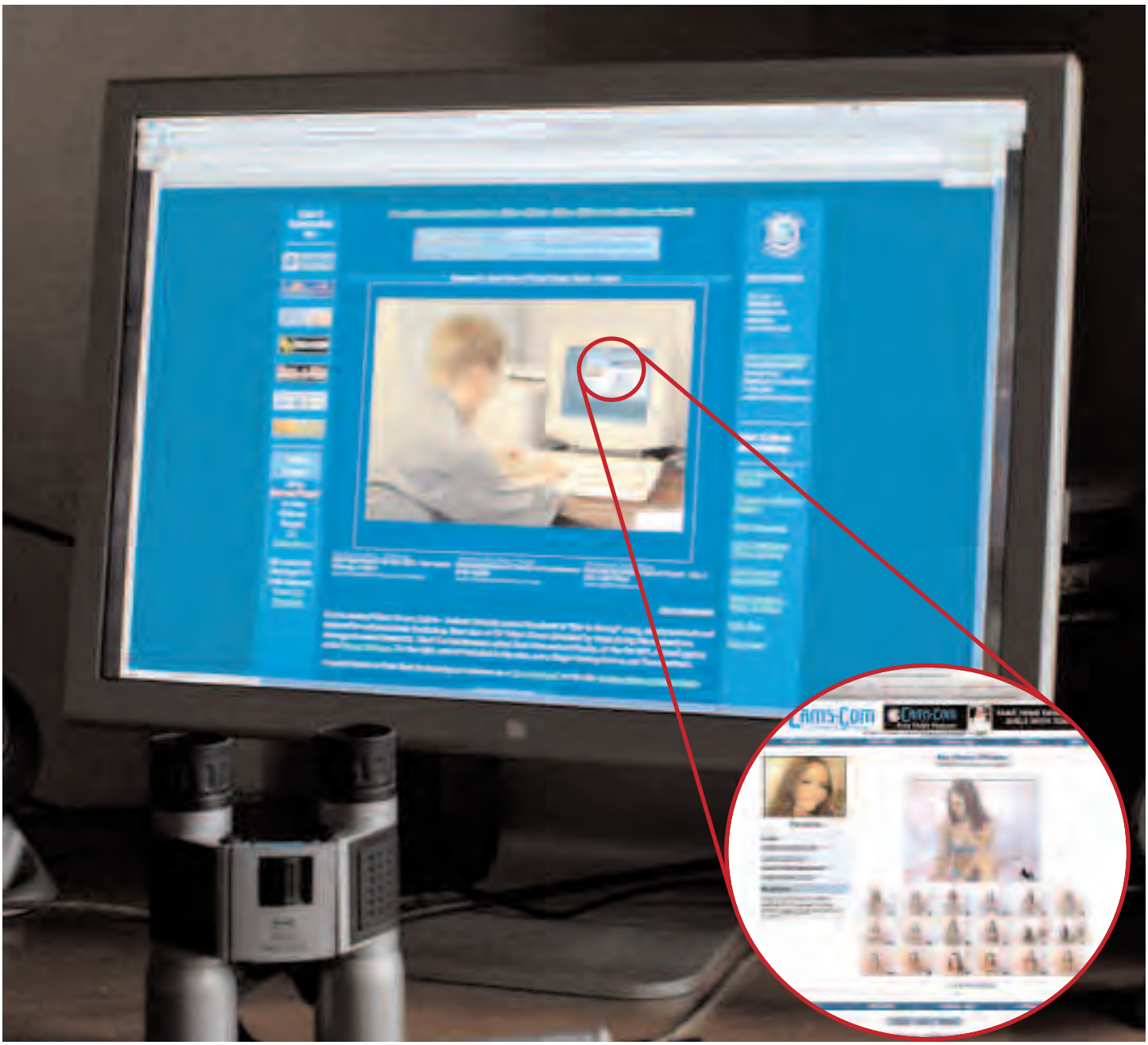
Comment

This ruling warns Governments against giving employers a wink and a nod to break their obligations under the WTR. By bringing non-statutory guidance within the scope of European law, the ECJ ensures that the DTI and other Government departments will have to guard against language that is not in full compliance with directives and case law.

An interesting question is whether the same rule will apply to Government agencies, such as ACAS, which issues numerous advisory leaflets to employers.

Keeping in touch

Although employers may think they have the automatic right to spy on their employees, either by physical search or via the Internet, the reality is that they need to approach the whole issue with caution



In this article, **Victoria Phillips**, head of Thompsons' Employment Rights Unit in London, looks at what the law says and recommends that trade unions draw up detailed policies to deal with monitoring.

Can an employer search their employee?

For once, the law is quite clear. An employer has no right to subject an employee to a physical search, whatever the circumstances, without their consent. If they are searched against their will, even if they do not suffer any personal injury, the employer is guilty of assault and they can sue for damages.

In reality, however, if an employee refuses to be searched and their employer cannot force them, then their suspicions are likely to be increased and they are likely to do one of two things:

- use the employee's refusal as evidence against them in a disciplinary hearing
- call the police, if the matter is sufficiently serious, to resolve the matter.

If an employee exercises the right to refuse to be searched and their employer uses the refusal to instigate disciplinary proceedings, they can resign and claim constructive dismissal. But this can be a very risky approach as the employee may not succeed in their claim and they would, by then, have lost their job.

What if the employer has the right to search their employee?

Even if the employer has the contractual right to subject their employees to a physical search, then it must be carried out in a reasonable way. For instance, it should be done in privacy by someone of the same sex as the individual.

The Data Protection Act 1998 places responsibilities on employers to process personal data in a fair and proper way

There should also be limits to which the employer can go – even if there is a contractual right to search, this does not mean that they can carry out an intimate strip search.

Can an employer monitor their employees?

The Data Protection Act 1998 does not prevent monitoring, but it places responsibilities on employers to process personal data that they hold in a fair and proper way. It applies to computerised information and to some manual records, such as personnel files.

According to the Information Commissioner, employers should make sure that their employees are aware of what they are doing and why. He has produced a code of practice to help employers, based on the requirements of the Data Protection Act.

The Information Commissioner also advises employers to be clear as to why they want to monitor their employees. They also need to be clear as to the benefits that will be delivered as a result.

It is usually intrusive to monitor employees and they are entitled to a fair degree of privacy. So, before employers start the monitoring process, they should think about whether there is any other way they can achieve their aims with less adverse impact on their staff.

What does the code say?

The code on monitoring makes a number of good practice recommendations that include the following:

- that monitoring should only take place for a clear, justified purpose, and employees should be aware that it is taking place.
- that emails that are clearly marked personal or private should only be opened by employers in exceptional circumstances
- that secret monitoring should only be authorised by senior management, and strictly targeted. It should only be used in extreme circumstances – for instance, for suspected criminal activity when it would be counterproductive to tell the individuals about the monitoring
- that employees should otherwise know when any video or audio monitoring is being carried out, and why
- that employers must assess the benefits to them as well as any adverse impact on their employees before they start to monitor them.

What restrictions are placed on employers?

Once an employer has decided to monitor their staff, they must tell them of their intention – perhaps by putting a notice on the noticeboard or via email. Whatever information they obtain through monitoring should only be used for the purpose for which it was carried out, unless they find out something they cannot ignore (a breach of health and safety, for instance).

The information they obtain must also be kept secure (so as few people as possible should be in the know), and they should not keep it for longer than necessary.

What policies can trade unions negotiate?

Trade unions should encourage employers to draw up policies to deal with electronic and telephone communications. This is also recommended by the code of practice.

The electronic policy should:
- state that their employer monitors emails and Internet use

Employers should appoint someone as a monitoring officer who has responsibility for ensuring compliance with the code

- any disciplinary action that the employer will take if anyone is found in breach of the policy
- set out a code of conduct for Internet users which identifies the circumstances in which they may use the Internet and the standards that apply
- make clear that anyone found accessing adult or pornographic sites will be subject to disciplinary action, which may result in dismissal
- warn employees not to make potentially defamatory statements by email
- require all Internet downloads to be subject to rigorous virus checks
- require personal communications to be kept to a minimum
- make clear that all other policies (such as harassment, discrimination and bullying) apply equally to Internet and email use.

Ideally, employers should appoint someone as a "monitoring officer" who has responsibility for ensuring compliance with the code, as well as ensuring that employees understand why the monitoring is being undertaken.

Trade unions should also draw up a policy to deal with telephone calls, addressing the following points:
- the type of calls that employees can make at work – such as quick calls to sort out domestic arrangements
- the timing of the calls they can make – for instance, an employer may only agree to let someone make calls during their breaks
- where the calls can be made from – in other words, whether they can be made from the phone on the employee's desk (if they have one) or whether they have to use a public phone. If the latter, the employer would have to ensure that sufficient were installed
- any disciplinary measures that the employer can take in the event of a breach of the policy.

A level pensions field

In 1990, the European Court of Justice (ECJ) decided in Barber -v- Guardian Royal Exchange Assurance Group that it was unlawful for pension schemes to have different ages at which the pensions of men and women became payable

In **Harland and Wolff Pension Trustees Ltd -v- Aon Consulting Financial Services (IDS 812)**, the High Court said that, until the scheme's rules were equalised in 1993, men were entitled to have their benefits levelled up to match those of women members.

What were the basic facts?

Until September 1993, the pension scheme at Harland and Wolff was governed by a set of rules that allowed for a normal retirement age of 60 for women and 63 for men.

Aon was taken on by the trustees to provide actuarial and pension benefit advice, including advice relating to the equal treatment requirement under what was then Article 119 of the Treaty of Rome (now Article 141 of the EC Treaty).

The scheme allowed the trustees to make retrospective amendments that reduced the level of benefits payable to members.

Subsequent to the Barber decision, and following advice from Aon, the trustees equalised the retirement ages at 63 in 1993, effective from 17 May 1990 (the date of the Barber decision). In other words, they reduced the level of the women's benefits to that of the men.

What was decided in Coloroll?

The ECJ expanded on Barber in Coloroll Pension Trustees Ltd -v- Russell and ors. It said that schemes could have different retirement ages for male and female members, but only for pensionable service up to 17 May 1990. It also said that schemes could equalize benefits either by reducing the retirement age for men or by increasing it for women.

But what about service between 17 May and the date that a scheme was amended – the so-called "Barber" window? The ECJ said that, during this time, the benefits of male members would have to be levelled up so that they were treated the same as female members.

Why were the parties in dispute?

The claimant in this dispute – a trustee – said that Aon should therefore have advised him that male members were entitled to the same level of benefits as female members between 17 May 1990 and 7 September 1993 (when the 1993 deed was executed).

He said that it was clear from the case law that schemes could not achieve equality by reducing the benefits of the women, but only by increasing the rights of the male members. On top of that, men had a separate right under Article 141, which could not be negated by the rules of the scheme.

Aon argued that, although Article 141 requires equality of treatment between the sexes, it does not stipulate that any particular level of benefit has to be provided. The 1993 deed was sufficient in that it equalised the benefits for men and women with effect from May 1990.

What did the High Court decide?

The High Court reviewed the decision of the ECJ in Coloroll, commenting that it was unclear from the judgement whether or not "account is to be taken of a power of amendment which might be exercised – validly under domestic law – to reduce accrued benefits".

It was clear from the decision that, if there was discrimination in relation to pay and if the scheme had not adopted any measures to eliminate it, then the only way of complying with article 141 was to level up the benefits. But if a rule had already been introduced to eliminate discrimination, there seemed to be no reason why benefits could not be reduced as article 141 just says they should be equal.

It followed that the 1993 rules were not consistent with article 141 in this case and that men were entitled to have their benefits levelled up to those of women

However, the court said that another ECJ decision in the case of Smith -v- Avdel clearly prohibited the practice of "levelling down" during the Barber window. It could not be right that schemes could get round the rule with a retrospective amendment.

It followed that the 1993 rules were not consistent with article 141 in this case and that men were entitled to have their benefits levelled up to those of women.

It makes you sick

Section 123 of the Employment Rights Act (ERA)1996 states that the amount of a compensatory award should be what the tribunal considers to be "just and equitable in all the circumstances"

However, **in Langley and anor -v- Burso (IDS 812)**, the Employment Appeal Tribunal (EAT) said that an employee on sick leave during the notice period was not entitled to full compensation although it might be good practice for employers to make a full payment in lieu of notice.

What were the basic facts?

Ms Burso was employed as a nanny by Mr Langley and Ms Carter for their two children from November 1999 to March 2004, when she was dismissed after an argument about a salary increase.

At around the same time, Ms Burso was involved in a car crash. As a result she was unable to work from 5 March to 12 July 2004, covering the whole of her notice period.

She complained to a tribunal, among other things, of unfair and wrongful dismissal.

What did the tribunal decide?

The tribunal agreed that she had been wrongfully dismissed because she was not given the eight weeks' notice to which she was contractually entitled. It calculated her loss at £3,440 (eight weeks' net pay).

In relation to the unfair dismissal claim, the tribunal calculated her compensatory award at £5,736. This did not include anything for the notice period because it had already been calculated as part of the wrongful dismissal award.

What did the parties argue on appeal?

Mr Langley appealed on the basis that the tribunal was wrong to assume that Ms Burso was entitled to full pay for the notice period. Instead, he argued she was only entitled to statutory sick pay – about £440.

Ms Burso relied, in part, on section 88 of the ERA which states that, if an employee with normal working hours is off work during the notice period because of sickness or injury, they are entitled to the normal rate of pay for that period.

She also cross appealed, relying on the decision in Norton Tool -v- Tewson, which said that it was good industrial relations practice for an employer to pay full pay in lieu of notice to an employee who was summarily dismissed.

The court also held in that case that, if an employer did not make a payment in lieu of notice, the employee was entitled to full pay for the notice period, without any reduction for any other monies they may have earned from any other source. Ms Burso said that Norton Tool applied to cases even where the employee was unable to work the period of notice because of sickness.

What did the EAT decide?

A majority of the EAT found in favour of Mr Langley, saying that the sick pay provision in the contract was clear, and there was no justification for concluding that it would not apply during the notice period. Although Mr Langley had paid Ms Burso in full for sick days in the past, the EAT said these were ex gratia payments.

The appeal tribunal also said that Ms Burso could not rely on section 88 ERA because of section 87(4). This says that section 88 does not apply if the contractual notice period exceeds the statutory minimum notice period by more than a week (as was the case here).

> The principle is that the tribunal must award sums which reflect the loss resulting from the dismissal

With regard to Norton Tool, a majority of the EAT held that it was no longer good law. Relying on the case of Dunnachie -v- Kingston, it said that "the principle is that the tribunal must award sums which reflect the loss resulting from the dismissal; it is not legitimate to award sums which are additional to such loss."

It concluded that section 123 simply does not allow compensation for a failure to comply with good industrial relations practice. It therefore awarded Ms Burso eight weeks' statutory sick pay as opposed to net pay. It also gave Ms Burso the right to appeal the Norton Tool point.

Broken record

Trade union officers always want as much evidence as possible when defending members in disciplinary hearings. But can they rely on tape recordings?

In **Chairman and Governors of Amwell View School -v- Dogherty**, the Employment Appeal Tribunal (EAT) said that although the recordings of the open hearings were made clandestinely, they could be used in evidence.

What were the basic facts?

Mrs Dogherty, a teaching assistant and school meals supervisor, was dismissed in June 2005 for misconduct. She attended three hearings (December 2004, April and June 2005) as part of the disciplinary procedure, all of which were minuted by the school.

Mrs Dogherty also recorded the hearings mechanically, but without the knowledge of any of the panel members. One of the recordings was of the "open hearing" when Mrs Dogherty was present, but another was of the June appeal hearing which included the panel's deliberations in a "closed hearing".

These recordings (and transcripts) were disclosed by her representative (Mr Thorogood) prior to her tribunal hearing for unfair dismissal. The school, however, objected to the recordings being used in evidence on two grounds – inadequate prior disclosure and the clandestine nature of the recordings.

What did the tribunal decide?

The tribunal agreed with the school that Mrs Dogherty had not adequately alerted them to the existence of the tapes or the transcripts in the run up to the hearing, but decided that the school's interests would by protected by ordering Mrs Dogherty to provide the tapes and the transcripts well in advance of a rehearing date.

Although the recordings had been made "clandestinely", it said that the evidence was important enough to be submitted.

What did the parties argue on appeal?

The school objected to that decision, arguing "that the public interest requires that the private deliberations of those involved as members of disciplinary and appeal panels remain 'private'. To do otherwise would infringe the rights of the governors under article 8 of the European Convention on Human Rights to respect for their private and family life."

Mrs Dogherty, on the other hand, argued that her "human right" to a fair hearing under article 6 of the convention would be undermined if the tapes were not admitted.

What did the EAT decide?

The EAT noted that the tribunal was clearly convinced that the material contained in the recordings was directly relevant to Mrs Dogherty's case, not least because the events at the hearings were hotly disputed by the two sides. There was, therefore, no procedural unfairness in the tribunal's decision.

It then looked at the school's objections to the evidence and completely rejected the notion that the governors' human rights would be violated. The case had no bearing on their family life and could not, therefore, have any impact on it. And as they worked in the public domain as governors, their private life could not be violated.

It agreed with the tribunal that the recordings had been made clandestinely, but as they had not been made illegally and were not made as the result of an "unlawful interception", there was no reason to exclude them on that basis.

The EAT also rejected the school's "public interest" argument about the recordings of the "open hearing" parts as Mrs Dogherty would have been entitled to take a verbatim record of this.

However, it accepted their argument about the closed hearing and ruled that she could not use these parts in her evidence in the unfair dismissal claim. It concluded that there was an important public interest that parties should comply with the "ground rules" on which disciplinary and appeal proceedings were based.

"No ground rule could be more essential to ensuring a full and frank exchange of views … than the understanding that their deliberations would be conducted in private and remain private," it said.

It emphasized that it was not creating a new class of public law interest immunity and that their decision might have been different had the claim been framed in terms of unlawful discrimination, or had the facts been different. Each decision, it said, was a balancing act between different rights and requirements.

Deduced a shortfall

The only time limit provided by statute for claims relating to unlawful deductions from wages relates to straightforward deductions, and states that time runs from the date that the deduction was made

The Employment Appeal Tribunal (EAT) has clarified in **Arora -v- Rockwell Automation Ltd** that the same time limit applies to claims involving an alleged shortfall.

What were the basic facts?

Mr Arora worked for Rockwell Automation Ltd from January to March 2005 when his employment ended. He subsequently wrote to ask why he had been dismissed, and at the same time "mentioned he was due payment for overtime".

Where there is a complete non-payment, the situation is different

He did not get a reply from the company until 15 April, when they wrote to say that the reason for termination was "unsuccessful completion of the probationary period". They set out the payment he was due, which included just over £1,000 for overtime.

Mr Arora then took out a grievance, saying he was owed more. However, as his employment had ended on 4 March, the tribunal said that the time limit for making a complaint was 4 June. His grievance, which he lodged on 16 June, was also outside the time limit and could not be used to extend it under the dispute resolution procedure.

He appealed, arguing that time did not start to run until 15 April (the date of payment of the wages from which the deduction was made), and that his grievance was therefore still in time.

What is a deduction?

The EAT identified three types of unauthorized deductions – a straightforward deduction which is identified as such; a complete non-payment; and a payment that is alleged to have a shortfall (as was the case here).

Originally, the courts said that the law governing this area could only cover straightforward deductions and did not include non-payments.

It was not until the 1991 case of Delaney -v- Staples that the term was widened to include the latter.

This is now contained in section 13(iii) of the Employment Rights Act (ERA) 1996 which states that:

"Where the total amount of wages paid on any occasion by an employer to a worker … is less than the total amount of the wages properly payable … the amount of the deficiency shall be treated … as a deduction made by the employer from the worker's wages on that occasion."

The EAT said this clearly covered the underpayment of overtime and commission to Mr Arora.

What time limits apply?

The EAT said that with a straightforward deduction in breach of contract, the time limit was set down in section 23(2) ERA. This stipulates that a tribunal cannot consider a complaint unless it is presented within three months from "the date of payment of the wages from which the deduction was made."

Where there is a complete non-payment, however, the situation is different and time begins to run from the payment date stipulated in the contract.

So what happens when the employer makes a payment, but with a shortfall? The EAT said this was no different to the situation when there has been an actual deduction in breach of contract. In other words, time runs from the moment the reduced payment is made.

It was clear according to the EAT that the letter from the company dated 15 April fell within section 13(iii) of the Employment Rights Act 1996. In this case time therefore started to run from 15 April, meaning that the grievance raised just over two months later was in time.

The EAT also drew attention to the fact that tribunals have a discretion to extend time limits where it was not reasonably practicable for the complainant to present their claim before the end of the three month period.

Comment

As the EAT noted, the irony of this situation is that time may start to run at an earlier date for employees who receive nothing from their employer, compared to employees who receive at least some payment. However, it concluded "that seems to us the inevitable consequence of this aspect of the law".

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